Case Commentary: *Bethell v Bethell* [2014] NZSC 177

On the 3rd December 2014, the Supreme Court closed the chapter on an ongoing family dispute concerned with a piece of land in Auckland; the dispute was between the ex wife and the widow against their sister in law. The Supreme Court dismissed the ex-wife and widow's application for leave to appeal, meaning that the ruling of the Court of Appeal remained in favour of Chrissie, the daughter of the will-maker, John Bethall. The Supreme Court determined that the matter had been thoroughly examined by the High Court and the Court of Appeal, and that neither Court had erred in their interpretation of the deed in the context of the particular circumstances of the case.

To understand the context of this dismissal of application for leave to appeal, we must look to the Court of Appeal judgment,[1] given by Randerson J, in September 2014. The appeal concerned issues pertaining to, inter alia, equity, contract and succession. The appeal involved a disputed claim over 10 acres of land at Te Henga on Auckland's west coast. John Bethall had inherited several blocks of land, including the principle block. John had 4 children: Margaret, Trudy, Ross and Christine (Chrissie). John devised the principle block to Ross, but this was subject to Chrissie having the right, during her lifetime, to rent, at a nominal sum, approximately 10 acres. Further, there was provision that if a subdivision could be achieved, then Chrissie would be entitled to have that 10 acres transferred to her absolutely. Difficulties in interpreting John's Will led to a Deed of family arrangement in 1987, and it was the interpretation of this that led to the appeal.

Under the Deed, Ross agreed that Chrissie could call for up to 10 acres, and the Deed provided that this area could be transferred to Chrissie absolutely on the proviso that the local authority gave consent to its subdivision from the principle block within the joint lives of Ross and Chrissie. The High Court accepted that Chrissie called for 10 acres in 1991. Chrissie believed the 10 acres included the camping ground and a larger area referred to as the "clay patch". In 2005 she lodged a caveat regarding her interest in that land, and in 2006 she applied for subdivision consent in respect to those 10 acres. Consent was given but Ross refused to transfer the land to her because he claimed that she was only ever entitled to camping ground land. This land had much less area than the 10 acres to which was referred in the Will and the Deed.

Two other matters are of relevance to the appeal. Firstly, Ross and his first wife, Maria, separated in 1999. A house (known as the White House) was moved on to part of the 10 acres in question. In 2004, Ross and Maria entered in to an agreement purporting to give Maria a life interest in the White House and the quarter acre of land around it. Secondly, Ross died in 2008. He had earlier married Vicky, the administrator of his estate. Vicky lives on the principal block in the house that she and Ross had both occupied. Vicky and Maria were the appellants in the appeal to the Court of Appeal and the Supreme Court.

The issues before the Court of Appeal were narrower than those before the High Court and included, inter alia: 1) to what area of land was Chrissie entitled; 2) what were the respective rights and obligations of Chrissie and Ross under the Deed; and,

[1] *Bethell v Bethell* [2014] NZCA 442 [5 September 2014].

3) did Maria have an interest in the White House and the land in priority of Chrissie's rights, or entitlement to any compensation.

1) The Area of Land to Which Chrissie was Entitled Under the Deed

Randerson J of the Court of Appeal confirmed that the High Court's determination of the 10 acres in the Deed was correct, being derived from the terms of the Will. The Deed and the Will should be read together as the whole purpose of the Deed was to modify, clarify or confirm the terms of the Will. Whilst Courtney J, of the High Court, did not refer to the principles relating to the construction of a will, the Court of Appeal noted that the object of the Court is to ascertain the intention of the testator "as expressed in his or her will when read as a whole in the light of any extrinsic evidence admissible for the purpose of its construction."[2] The starting point is that a word or a phrase should be given its ordinary meaning,[3] but where there is ambiguity, then the Court is entitled to put itself in the position of the will-maker.[4] Thus, a court will endeavour to give effect to the will-maker's intentions.

The Court of Appeal noted that the Supreme Court of the United Kingdom held that the approach for interpreting wills should be the same as that of interpreting commercial contracts.[5] However, the Court of Appeal added that whether the case was approached on the basis of principles applicable to wills, or on the basis of principles applicable to commercial contracts, the background facts known to the parties at the time of the Will and the Deed were relevant. The Court of Appeal determined that the 10 acres to which was referred in the Deed was intended to have the same meaning as the Will, thus overall the Court concluded that the Courtney J was right to determine that Chrissie's entitlement was not limited to the camping ground, but extended up to an area of 10 acres within that vicinity. If the Court deemed it necessary to go beyond the terms of the Will and the Deed, there was evidence that supported Chrissie's assertions as to the 10 acres to which she was entitled, including witness statements and legal advice pertaining to the Deed referring consistently to the 10 acres.

2) The Respective Rights and Obligations of Chrissie and Ross

Chrissie's rights were subject to analysis in both contractual and equitable terms. In the High Court, Chrissie argued that she acquired an interest enforceable by specific performance, which proceeded by analogy with a claim for specific performance of an agreement for sale and purchase. This was on the basis of the well-established principle in *Attorney-General for England and Wales v R*,[6] where a purchaser acquires an equitable interest in the land if the contract is capable of being enforced by specific performance. The Court of Appeal, however, whilst acknowledging that

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[2] At [35], referring to GE Dal Pont and KF Mackie *Law of Succession* (LexisNexis, Australia, 2013) at [8.4]; and *Laws of New Zealand* Wills at [164].
[3] At [35], referring to GE Dal Pont and KF Mackie *Law of Succession* (LexisNexis, Australia, 2013) at [8.6], referring to *Abbot v Middleton* (1858) 7 HL Cas 68 at 114, 11 ER 28 at 46.
[4] At [35], referring to GE Dal Pont and KF Mackie *Law of Succession* (LexisNexis, Australia, 2013) at [8.39] referring to *Allgood v Blake* (1837) LR 8 Ex 160 at 162 (Exch) and *Perrin v Morgan* [1943] AC 399 at 414 (HL).
[5] At [38] referring to *Marley v Rawlings* [2014] UKSC 2 at [17]-[26].
[6] At [52] referring to *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) at [94].

Chrissie's equitable interest depended on the analogy of an agreement for sale and purchase, explored a more appropriate alternative approach.

The Deed was not expressed in terms of sale and purchase and cl 6(i) of the Deed did not require Chrissie to provide consideration. Instead cl 6(i) simply repeated, in a modified fashion, the rights as a gift to which she was entitled under cl 7 or cl 8 of the Will. The strict requirement for an identified parcel of land that would apply in cases of sale and agreement therefore was not directly applicable. Instead, cl 6(i) showed that Chrissie had some choice. Firstly, she was entitled to call for an allotment at any time, so long as any subdivisional approval was given in the lifetime of Ross and herself. Secondly, she had a choice as to the size of the allotment. There was nothing to suggest that she was required to obtain Ross' consent as to either size or shape of the land for which she called. The Court noted that it was more appropriate to take an approach that was more consistent with that adopted in interpreting a will. Therefore Chrissie's right to choose the final shape of the 10 acres was also supported by settled principles applicable to will construction, and thus by analogy, to the Deed modifying the Will.

Ross had express and implied obligations under cl 6(i). Regarding the express obligations, he was required to sign survey plans, memorandum of transfer or other documentation that enabled Chrissie to receive the said area subject to local authority approval. Ross had implied obligations to facilitate the allocation and subdivision of the area up to 10 acres for when Chrissie called as the Court recognised. This included the implied obligation not to do anything that would impede Chrissie from securing the allotment. The obligations arose from the express terms of cl 6(i) and by analogy to well-understood principles in contracts for sale and purchase of land, including implied obligations to take reasonable steps to fulfil a conditional contract.[7] Therefore, the Court concluded that Ross breached his contractual obligations under the Deed. Alternatively, a similar result followed from an analysis of his equitable obligations arising under the Deed. However, Courtney J did not find it necessary to pursue this issue further because of the finding of breach of contract; the Court of Appeal concurred.

In summary therefore, the Court of Appeal concluded that Chrissie's equitable interest arose on the signing of the Deed in 1987, and her equitable interest was sufficient to support a caveat as recognised in 2005. This provided sufficient basis to enable her to apply for injunctive relief should Ross attempt to sell the land or grant an interest in it that may have priority over Chrissie's interest.

3) *Does Maria Have Any Interest in the White House and Land in Priority of Chrissie's Rights/Entitlements*

After Ross and Maria separated, they entered in to an informal agreement, without legal advice, in May 2004, that gave Maria full ownership of the White House with a life time interest in the land of circa ¼ acre around the house, and a right of access to it up the existing driveway. The Court confirmed that by virtue of s 21F of the Property (Relationships) Act 1976, the agreement was void. Notwithstanding the Act,

[7] At [64]-[65] referring to John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [8.25] and *Steele v Serepisos* [2006] NZSC 67; [2007] 1 NZLR 1.

the Court was satisfied that Ross had no authority to grant Maria an interest in the property that had priority over Chrissie's entitlement. In doing so, he breached his contractual obligations as already set out. Therefore Maria did not have any equitable interest in Chrissie's allotment that could take priority over any of Chrissie's legal or equitable title to the land. The consequence of this for Maria was that she now had no entitlement to occupy any part of the allotment for which Chrissie has obtained resource consent. The Court also concluded that Maria has no entitlement to an interest in the house itself either.

The Court was informed that since the house was moved on to the land, it had become permanently fixed to the land, which had incurred substantial costs. The house could now only be moved at additional substantial costs and with difficulty. As per the established principle, the Court treated this house as being part of the land in these circumstances.[8] Counsel submitted that Chrissie would be unjustly enriched if she became entitled to the White House. It was further submitted that any order for specific performance be made on the condition that Chrissie pay Maria compensation on the value of the house.

The Court of Appeal concurred with Courtney J that this submission should be rejected. This was because neither Maria nor Ross had any lawful right to the house. Further, Ross took a calculated risk when he moved the White House on to the property. Maria could seek relief against the estate however. Maria also sought compensation for work carried out on the White House during the period of 2010-2013. Courtney J rejected these claims, with which the Court of Appeal concurred. The reasons being that, whilst Maria and Chrissie took their respective interests in good faith, Maria knew of Chrissie's claim within a relatively short period of time. The work on the House had been carried out when Maria knew of Chrissie's claim to the land on which the White House was established and there was no established principle on which a claim of compensation could be based in these circumstances.

Therefore in conclusion, the dismissal of the application for leave to appeal by the Supreme Court has brought to a close the long-running family battle for an area of land. What the case has also done is confirm some well-established principles of succession and contract, and the application of equitable principles. It also emphasises the very real importance of obtaining legal advice in relation to property matters, which may then go someway to help prevent a breakdown in family relationships.

[8] At [87] referring to GW Hinde, DW McMorland and NR Campbell *Principles of Real Property Law* (2nd ed, LexisNexis, Wellington, 2014) at [6.034]-[6.036]; *Lockwood Buildings Ltd v Trustbank Canterbury Ltd* [1995] 1 NZLR 22 (CA).